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No. 92-1546

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN O. IRVINE and

FIRST TRUST NATIONAL ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal gift tax can properly and constitutionally be applied to tax a disclaimer of a remainder interest created in 1917, fifteen years before enactment of the federal gift tax statute in 1932, where the disclaimant's time for disclaimer under the regulation sought to be applied by petitioner ("Regulation") expired *before* enactment of the gift tax, *before* she had any reason to know that a disclaimer timely and effective under local law could be untimely and ineffective under a federal gift tax law not yet enacted.

2. Whether the Regulation can ever properly and constitutionally be applied in measuring the effectiveness for federal gift tax purposes of a disclaimer, timely and effective under local law, of an interest created before enactment of the federal gift tax statute in 1932, even in situations, unlike the present case, in which the disclaimant's time for disclaimer under the Regulation would not have expired before enactment of the gift tax.

3. Whether the Regulation applies at all when measuring the effectiveness for federal gift tax purposes of a disclaimer of an interest created in an *inter vivos*, as opposed to a testamentary, transfer.

4. Whether alternative grounds support the judgment of the *en banc* court of appeals, including that (a) the disclaimer in fact satisfied the Regulation, (b) if the Regulation applies and the disclaimer falls within the scope of the holding of *Jewett v. Commissioner*, 455 U.S. 305 (1982), it is improper and inequitable to apply the 1982 *Jewett* holding retroactively to tax the 1979 disclaimer at issue here, where the disclaimer was made in accordance with the then-governing law in the circuit in which the disclaimant had resided during her entire life, and where

the announced policy of the Internal Revenue Service was that it would follow that law for taxpayers residing in that circuit, and (c) if it is held to apply, *Jewett* should be reconsidered due to failures by both parties to apprise the Court fully of the authorities relevant to its determination of that case.

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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review of the *en banc* Eighth Circuit's judgment in this case. The judgment is not in any respect contrary to this Court's decision in *Jewett v. Commissioner*, 455 U.S. 305 (1982), does not present a square conflict with the judgment of any other federal circuit, and does not present any recurring or important issue for this Court. In addition, the judgment is supported by at least three alternative grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the portions of Sections 2501(a)(1) and 2511 of the Internal Revenue Code and Section 25.2511–1(c) of the Treasury Regulations set out in the petition, *see* Pet. 2,1/ the following constitutional and statutory provisions are directly involved in the case:

1. The Due Process Clause of the Fifth Amendment to the U.S. Constitution, which provides that "[n]o person shall . . . be deprived of . . . property, without due process of law . . . ."

2. Section 501(b) of the Revenue Act of 1932, 47 Stat. 245, which provides that "[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932]."

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, Respondents draw the Court's attention to certain relevant factual errors and omissions in the petition.

1/ "Pet." refers to the petition for a writ of certiorari, "Pet. App." refers to the appendix to the petition, "8th C. Br." refers to the main brief filed by Petitioner in the court of appeals, "8th C. App." refers to the appendix filed by Petitioner in the court of appeals, "8th C. Supp. App." refers to the supplemental appendix filed by Respondents in the court of appeals, and "D.Ct. Br." refers to the main brief filed by the Petitioner in the district court in support of its motion for partial summary judgment, found at D. Ct. Docket Doc. II-28 (*see* 8th C. App. 3). "Oral Arg." refers to the taped oral argument before the *en banc* court of appeals on January 6, 1992, which is on file with the Clerk of that court. Respondents obtained a copy and have prepared a transcript of the tape.

A. Nature of Action

This is an action for refund of $7,530,706.90 in federal gift tax erroneously assessed against and collected from Sally O. Irvine in 1982, plus statutory interest. 8th C. App. 18. Mrs. Irvine died in 1987, and Respondents John O. Irvine and First Trust National Association[2/] are the co-representatives of her Estate, the successor-in-interest to her refund claims. Pet. App. 2a, 4a.

The action involves the effectiveness for federal gift tax purposes of Mrs. Irvine's written Disclaimer of a portion of her remainder interest in the Ordway Trust ("Trust"). The Trust was created by her grandfather Lucius Ordway ("Lucius") in an *inter vivos* transfer in 1917, Pet. App. 2a, fifteen years before enactment of the federal gift tax statute on June 6, 1932 ("Gift Tax Act" or "Act").[3/]

B. History and Terms of the Trust

Mrs. Irvine was six years old when Lucius created the Trust in 1917. The Government conceded in the lower courts that Mrs. Irvine had learned of her remainder interest in the Trust by the time she reached the age of majority. 8th C. Br. 3; D. Ct. Br. 4-5. The lower courts and the parties assumed that the age of majority

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2/ Pursuant to Supreme Court Rule 29.1, Respondent First Trust National Association states that it is a national banking association organized under the laws of the United States and a wholly-owned subsidiary of First Bank System, Inc., a Delaware corporation. Respondent has no subsidiaries.

3/ Rev. Act of 1932, §§ 501-532, 47 Stat. 245-59.

was twenty–one, which Mrs. Irvine reached in 1931. Pet. App. 3a.4/

The Trust was to continue until the death of the survivor of Lucius's wife and five children. Then, the Trust would terminate and the Trust principal would be distributed in equal shares to Lucius's grandchildren then living and the deceased grandchildren that had died leaving issue. Mrs. Irvine, as Lucius's grandchild, would be entitled to a share of the Trust principal only after expiration of the intervening life interests, only if she were alive at that time, and only if she were to accept the interest. Pet. App. 2a-3a.

C. Mrs. Irvine's Disclaimer

Upon the death of Lucius's last surviving child in June 1979, the Trust terminated. Mrs. Irvine filed her Disclaimer shortly thereafter. Pet. App. 3a. Minnesota law recognizes, as it did throughout the term of the Trust, a beneficiary's right to refuse, by disclaimer, to accept ownership of a remainder interest in trust principal. *See Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973) (interpreting Minnesota common law and statute), *overruled on other grounds, Jewett v. Commissioner*, 455 U.S. 305 (1982). The Government concedes that Mrs. Irvine's Disclaimer was a valid, timely, and effective refusal to accept ownership of the interest under Minnesota law, the applicable local law. Pet. 3. In the courts below, the Government also conceded that Mrs. Irvine never accepted any part of her remainder interest. *E.g.*, 8th C. Br. 4 (citing to Respondents'

4/ In fact, during the relevant time period, the age of majority for women in Minnesota was eighteen, reached by Mrs. Irvine in 1928. Minn. Stat. Rev. 1866, ch. LIX, § 2; *see Vlasak v. Vlasak*, 204 Minn. 331, 283 N.W. 489 (1939).

complaint); Oral Arg.[5/] The Government's attempts now to suggest otherwise, in repeatedly referring to Mrs. Irvine's receipt of income benefits under the Trust's separate, entirely different provisions creating life interests, *see* Pet. 3, 13, 14, are both improper and incorrect.[6/] As a result of the Disclaimer, Mrs. Irvine was treated under Minnesota law as if she had died before the Trust's termination, and her children became entitled to equal shares of the disclaimed interest in accordance with Lucius's intent set forth in the 1917 Trust instrument. Pet. App. 4a.

D. The Government's Assessment of Tax

Under the Gift Tax Act and its successor provisions in the Internal Revenue Code, a disclaimer effective for federal gift tax purposes is *not* a transfer of property by the disclaimant (which would be taxable as a gift). Rather, because the disclaimant has refused to accept ownership, the property is considered to be transferred directly from the original transferor to the person ultimately taking in accordance with the trust instrument (and thus nontaxable). Petitioner (the "Government") assessed tax against Mrs. Irvine solely on the basis that the Disclaimer was not effective under Treasury Regulation § 25.2511-1(c) ("Regulation"). The Regulation, interpreting the gift tax provisions of the Code enacted in 1932, was first

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5/ Court: Is that covered by the stipulation?
Mr. Paup: We have agreed there was no acceptance as to the remainder interest.
[Michael L. Paup, appearing for the Government.]

6/ The Government's new attempt is also disingenuous. The Government's own regulations recognize that, because the interests are entirely separate, receipt of trust income as a life interest holder has no effect on the ability to disclaim a remainder interest. Treas. Reg. §§ 25.2518-2(d)(1) and (4) (Ex. 1), 25.2518-3(a)(1).

promulgated in 1958 and then amended in 1986 (1986 addition indicated by underscoring):

> (2) In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, [w]here the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transferred from a decedent . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be . . . effective under the local law.

Mrs. Irvine resided in Minnesota, in the Eighth Circuit, for her entire life. At the time of her Disclaimer, *Keinath*, an Eighth Circuit decision, was the only appellate court case that had interpreted the 1958 Regulation. *Keinath* involved the disclaimer of a remainder interest in a testamentary trust created in 1944, made shortly after the trust terminated in 1963, in accordance with Minnesota law. *Keinath* was the first case in which the Government publicly took the position that "transfer" as used in the 1958 Regulation meant the initial transfer creating the remainder interest, rather than the termination of the trust. The Court of Appeals for the Eighth Circuit rejected this position, holding that under the 1958 Regulation, as well as under Minnesota law, the "reasonable time" began to run when the trust terminated and, thus, that the 1963 disclaimer was timely. 480 F.2d at 64. The Government's announced policy after *Keinath* was that it would follow *Keinath* with respect to taxpayers residing in the Eighth Circuit. *See, e.g.*, T.A.M

7829008 (CCH) (Apr. 14, 1978).2/ Mrs. Irvine's Disclaimer was clearly timely under the 1958 Regulation as interpreted in *Keinath*, and it was also timely and effective under Minnesota law.

The Government assessed the tax in this case immediately after this Court's decision in *Jewett v. Commissioner*, 455 U.S. 305 (1982), believing that *Jewett* and its interpretation of the 1958 Regulation controlled the gift tax treatment of Mrs. Irvine's Disclaimer. 8th C. Supp. App. 2, 11. *Jewett* involved a disclaimer in 1972 of a remainder interest in a testamentary trust created in 1939. The Court held that the "transfer" referred to in the 1958 Regulation was the 1939 transfer creating the remainder interest, not the event causing the trust to terminate, and that the "reasonable time" for disclaiming therefore began to run with that 1939 transfer, even though under applicable local law the time would not begin to run until termination of the trust. 455 U.S. at 318. *Jewett* thus rejected *Keinath*'s interpretation of the 1958 Regulation.

In 1986, the Government added the "taxable transfers" language to the Regulation, providing that the Regulation applies only to disclaimers of interests created in "taxable transfers" before 1977, requiring disclaimer within a reasonable time after knowledge of that transfer. The Government seeks to apply the 1986 Regulation to Mrs. Irvine's Disclaimer, not the 1958 Regulation. Pet. 16;

2/ A "TAM" (Technical Advice Memorandum) is a written statement issued by the IRS National Office to a district director in connection with the examination of a taxpayer's return or consideration of a taxpayer's claim for refund or credit. Treas. Reg. § 301.6110-2(f). TAMs, like General Counsel's Memoranda ("GCMs") and letter rulings, are statements of IRS policy. *Taxation with Representation Fund v. Internal Revenue Service*, 646 F.2d 666, 669-71 (D.C. Cir. 1981) (GCMs); *Tax Analysts and Advocates v. Internal Revenue Service*, 505 F.2d 350, 353 (D.C. Cir. 1974) (TAMs and letter rulings).

Oral Arg;[8/] *see also* I.R.C. § 7805(b). Although Mrs. Irvine's interest was created in 1917, in a *non*taxable transfer, the Government nonetheless contends that transfer was "taxable." And although the Government fails to acknowledge the point in its petition, Mrs. Irvine's time for making an effective disclaimer under the 1986 Regulation expired *before* enactment of the Gift Tax Act on June 6, 1932. The Government *conceded* this critical point in the court below. Oral Arg.[9/]

8/ Court: . . . . What I don't understand is why didn't you argue that you should win under the '58 Regulation which does not contain that phrase?

Mr. Paup: Well, your honor, the regulations were promulgated and were given effect retroactively at the time they were promulgated.

Court: That is, back seven years to the . . .

Mr. Paup: That is the normal way tax regulations interpreting the law are put into effect.

Court: Okay, so you've got to win with the definition of "taxable transfer?"

Mr. Paup: Yes, sir, and I think we can and should win with the definition of "taxable transfer."

9/ Court: When in your view must she have done the disclaiming to have been reasonable?

Mr. Paup: Well, the regulations don't establish a bright line.

Court: But what's the Government's position?

Mr. Paup: Our position is that it had to be within a reasonable time.

Court: As to what, Mr. Paup, as to what?

Mr. Paup: Within a reasonable time after knowledge of the existence of the initial transfer.

Court: And, prior to the passage of the gift tax?

Mr. Paup: Ah, in this case, certainly, since she knew about it, reached her majority in 1931.

Court: So, the government's position is to have been effective it would have had to have been prior to first enactment, initial enactment of the tax.

. . .

Mr. Paup: That's correct, your honor.

Mrs. Irvine paid the tax assessed by the Government under protest, and Respondents commenced this refund action in the United States District Court for the District of Minnesota in 1988.

E. Action by the Lower Courts

Respondents moved for summary judgment in the district court, arguing principally that application of the Regulation to Mrs. Irvine's Disclaimer violated the express language of the 1986 Regulation, Congress's prohibition of retroactive application of the Gift Tax Act, and the Due Process Clause of the Fifth Amendment. The district court granted Respondents' motion, holding that the Regulation did not apply, and that disclaimers of pre-Act interests are effective for federal gift tax purposes as long as they are valid under applicable state property law.

The district court recognized that *Jewett* presented only a "narrow question" of interpretation of the 1958 Regulation, and that the fundamental distinction between *Jewett* and the present case was that Mrs. Irvine's interest was created well before enactment of the Act. Pet. App. 56a. The district court rejected the Government's construction of the 1986 Regulation to apply retroactively to interests created *before* enactment of the Act, because Congress had clearly stated its intent to avoid retroactive application of the gift tax statute. Pet. App. 57a; *see* Act § 501(b). As the district court understood, under the Government's harsh construction, the time for Mrs. Irvine to disclaim under the 1986 Regulation would have expired before the existence of the federal gift tax, before there was any reason to know that a disclaimer timely under state law could be untimely under federal gift tax laws not yet enacted. Pet. App. 57a–58a.

A split panel of the Eighth Circuit reversed. Judge McMillian and Senior Judge Bright, writing separately, concluded that the 1986 Regulation, despite its language

explicitly limiting its application to disclaimers of interests created in "taxable transfers," nevertheless should be construed to apply to disclaimers of interests created in pre-Act, *non*taxable transfers, such as Mrs. Irvine's interest. Pet. App. 38a, 42a. Judge Bowman dissented from the panel decision, concluding that the others' opinions based on the "taxable transfers" language of the 1986 Regulation were "startling" and contrary to "logic, history, the expressed intent of Congress, and a straightforward reading of the regulations." Pet. App. 47a, 48a (footnote omitted).

The court of appeals granted Respondents' petition for rehearing *en banc*, vacating the panel decision, and then affirmed the district court. The *en banc* court recognized that the Government had assessed the tax solely on the basis of the Regulation. The express language of the 1986 Regulation limited its application to interests created in pre-1977 "taxable transfers," and this was dispositive to the court: the 1986 Regulation, by its terms, did not cover Mrs. Irvine's Disclaimer of an interest created before enactment of the gift tax. As the court of appeals said:

> It is fundamental that for a transfer to be taxable there must be an applicable tax in existence when the transfer is made.

Pet. App. 7a. This is particularly so, the court recognized, in the context of the federal gift tax, because Congress expressly stated that the Gift Tax Act must not be retroactively applied to transfers made before June 6, 1932. Pet. App. 7a; *see* Act § 501(b). Congress continued its prohibition on retroactive application throughout

multiple, subsequent revisions to the Act. Pet. App. 7a.[10/] The court reasoned further that it would be anomalous, and contrary to Congress's clear intent against retroactive application, to apply the 1986 Regulation's separate federal timeliness standard to tax a donee's refusal to accept a gift that never was subject to tax in the first place. Pet. App. 5a–6a. Given the express language of the 1986 Regulation, Congress's express intent, and the constitutional history, the court declined to accept the "startling conclusion" of the split panel decision in *Ordway v. United States*, 908 F.2d 890 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991), that "taxable transfers" included a pre-Act, nontaxable transfer. Pet. App. 8a. In *Ordway*, solely on the basis of the "taxable transfers" language, two members of the Eleventh Circuit panel had held a disclaimer by Mrs. Irvine's brother John Ordway to be taxable.[11/]

The *en banc Irvine* court concluded that "[o]nce the pretense that by some mysterious alchemy the treasury regulations have transformed the 1917 transfer into a taxable event is stripped away, the government is left

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10/ The court also recognized that Section 501(b)'s prohibition has constitutional underpinnings. Pet. App. 10a n.4; *see Untermyer v. Anderson*, 276 U.S. 440 (1928); *Blodgett v. Holden*, 275 U.S. 142 (1927) (first federal gift tax enacted on June 2, 1924, held unconstitutional as applied to gifts made before that date).

11/ The *en banc Irvine* court noted that the *Ordway* majority had premised its interpretation on a single sentence in a *different* regulation interpreting a *different* code section (Treas. Reg. § 25.2518-2(c)(3)), plainly inapplicable to the situation before it. That regulation provides that "a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." The *Irvine* court recognized not only that the second regulation did not apply, but that it simply did not support the *Ordway* majority's conclusion, because there could be no "completed gift for Federal gift tax purposes" since no gift tax was in force when the gift was made. Pet. App. 8a–9a.

without any basis to sustain its position." Pet. App. 10a. The court agreed with Respondents that absent the 1986 Regulation's application, controlling precedents of this Court and the Eighth Circuit hold that state law governed the validity of Mrs. Irvine's Disclaimer for federal gift tax purposes. Pet. App. 10a–11a, *citing Jewett*, 455 U.S. at 315 (under cases antedating the 1958 Regulation, "state law controlled both the 'right' to renounce and the 'timeliness' of the renunciation"), and *Hardenbergh v. Commissioner*, 198 F.2d 63 (8th Cir.) (in a case decided before adoption of the 1958 Regulation, court applied state law to determine validity for federal gift tax purposes of disclaimer of intestate shares), *cert. denied*, 344 U.S. 836 (1952). Because it concluded that the 1986 Regulation was plainly inapplicable, the court did not need to reach Respondents' statutory and constitutional arguments.

Judge Loken, who joined in the court's opinion regarding the 1986 Regulation, filed a concurring opinion stating that the 1958 Regulation did not apply either, because that regulation plainly applied only to interests created in testamentary, and not *inter vivos*, transfers. Pet. App. 13a. He reasoned that limiting the 1958 Regulation to its plain language is consistent with interests of fairness and predictability in the tax laws, given that the 1958 Regulation and its federal timeliness requirement were inconsistent with prior judicial interpretations of the gift tax statute. Pet. App. 16a.

Judge McMillian filed a dissenting opinion, adhering to his earlier interpretation of the 1986 Regulation, Pet. App. 17a, and also rejecting one of Respondents' alternative arguments, that the 1982 *Jewett* holding should not be applied retroactively to Mrs. Irvine's 1979 Disclaimer, which was made in accordance with the then-governing law of the Eighth Circuit. Pet. App. 27a–28a.

F. **There is No Flood of Cases Involving Disclaimers of Pre-Gift Tax Act Interests.**

Despite the Government's hyperbole suggesting a flood of cases involving the issue presented here, *see* Pet. 11, 20-21, it has provided no factual support for its statements. Respondents are aware of no other court case, past or pending, presenting the question of the effectiveness for federal transfer tax purposes of a disclaimer of a pre-Act interest by someone like Mrs. Irvine, whose time for disclaimer under the Regulation would have expired *before* enactment of the Act. Only in cases involving such disclaimants does the Government's application of the Regulation retroactively deprive the disclaimant of all opportunity to make an effective disclaimer.

The only two cases the Government has cited, past or pending, that present any question of the effectiveness of a disclaimer of a pre-Act interest both involve disclaimers in the same family Trust involved here made by relatives of Mrs. Irvine who reside in Florida, in the Eleventh Circuit. One case is *Ordway*, the case discussed above involving a disclaimer by Mrs. Irvine's brother John Ordway.[12/] The other, *Johnson v. United States*, No. 89-8192 (S.D. Fla. filed Apr. 27, 1989), involves a disclaimer by Mrs. Irvine's cousin Mary Johnson.[13/] The

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12/ This Court denied Ordway's petition for a writ of certiorari, 111 S. Ct. 2916 (1991), and his subsequent petition for rehearing and motion to defer consideration pending the *en banc* court of appeals decision in the present case. 112 S. Ct. 30 (1991).

13/ The Government misleadingly implies that there are two different *Johnson* cases involving disclaimers of interests in the Trust. *See* Pet. 20. In fact, there is only one case. Johnson had recently moved to Florida when she filed her refund action there. Johnson filed the Minnesota case only as an alternative action, in the event it is determined in the Florida action, contrary to Johnson's position,

district court has not yet addressed the issue of the effectiveness of Johnson's disclaimer.

Both relatives, unlike Mrs. Irvine, reached the age of majority long after enactment of the Act. Ordway, born in 1922, learned of his interest in 1941 and reached the age of majority in 1943. *Ordway*, 908 F.2d at 891-92. Johnson, born even later, in 1929, did not reach the age of majority until 1950. 8th C. Supp. App. 16. In contrast to Mrs. Irvine, Ordway's and Johnson's time for disclaimer under the Regulation did not begin to run until *well after* enactment of the Act.

Respondents know of only one other court case, past or pending, that presents any question of the effectiveness of a disclaimer of a pre-Act interest. The case, *Perkins v. United States*, No. 93-1094OT (D. Mass.), was filed on April 29, 1993. According to the taxpayer's complaint, the case involves a disclaimer in 1977 of a remainder interest in a testamentary trust created in 1926. Taxpayer seeks a refund of only $116,063.43 in tax and interest paid in 1986. Respondents' counsel have been informed by taxpayer's counsel that the disclaiming taxpayer, Frances Perkins, reached the age of majority after enactment of the Act. Her time for disclaimer, like Ordway's and Johnson's, also did not begin to run until after the Act.[14/]

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that Johnson is a resident of Minnesota rather than Florida. Complaint ¶ 1, filed in *Johnson v. United States*, No. 3-89-265 (D. Minn. filed Apr. 28, 1989).

14/ Respondents' counsel also have been informed that the taxpayer in *Perkins* has recently died. The trust instrument is not attached to the complaint, and Respondents know nothing else about the facts of the case. There may be additional fundamental distinctions between this case and *Perkins*, such as acceptance, lack of knowledge of the trust until after enactment of the Act, or other powers under the trust existing past June 6, 1932, and extending the right to disclaim.

REASONS FOR DENYING THE WRIT

A. The *En Banc* Court of Appeals Decision in *Irvine* is Not in Conflict with this Court's Decision in *Jewett*.

The Government contends that certiorari should be granted because the result below contradicts this Court's decision in *Jewett*. According to the Government, *Jewett* held that Congress intended that *any* disclaimer of a remainder interest in a trust is a "transfer of property by gift" to which the gift tax applies. Pet. 11. As both courts below recognized, the Government has flatly mischaracterized the *Jewett* holding to make this contention.[15/] The result in this case does not conflict with *Jewett*, because it involves a different Treasury Regulation and different facts.

15/ The Government recognized in its brief filed in *McDonald v. Commissioner*, 853 F.2d 1494 (8th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989), that the ability effectively to refuse a gift is *implicit* in Section 2511 of the Code. 8th C. Supp. App. 6, 52. *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933), established this principle in 1933. In a recent official policy statement, the Government reiterated that effective disclaimers are not "transfers":

> Because the disclaimant is regarded as never having accepted or received the disclaimed property, the disclaimer is not considered to involve a transfer of property by the disclaimant.... This "no transfer" analysis is reflected in a very early tax case which held that a disclaimer of a legacy was a refusal to accept the property, rather than a transfer of property by the disclaimant in contemplation of death. *Brown v. Routzahn*, 63 F.2d 914 (6th Cir. 1933).

G.C.M. 39858, 1991 I.R.S. G.C.M. LEXIS 34 (Sept. 9, 1991).

As Justice Stevens wrote for the majority, *Jewett* involved only a "narrow question" of interpretation of the 1958 Regulation:

> The narrow question presented is whether the "transfer" referred to in the Regulation occurs when the interest is created [in 1939], as the Government contends, or at a later time when the interest either vests or becomes possessory, as argued by petitioner.

Id. at 306. The 1958 Regulation interpreted in *Jewett* does not apply to Mrs. Irvine's Disclaimer. The *1986 Regulation* is at issue here, and it applies only to disclaimers of interests created in pre-1977 "taxable transfers."

Moreover, this case presents statutory and constitutional issues that were not before the Court in *Jewett*. Unlike Jewett, whose interest was not created until 1939, Mrs. Irvine's time for making an effective disclaimer expired *before* enactment of the Gift Tax Act under the Regulation as applied by the Government. As Respondents argued in the courts below, this retroactive application of the Regulation to Mrs. Irvine, precluding her, without notice, from ever making an effective disclaimer, violated both the Act and the Due Process Clause.[16/] Respondents' statutory argument was based primarily on Section 501(b) of the Act, which provides that "[t]he tax shall not apply to a transfer made on or

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16/ The Government has acknowledged that "the 1917 transfer . . . establishes the date from which the taxpayer is given a 'reasonable time' to disclaim an interest in property under the regulation . . . ," 8th C. Br. 25, and that Mrs. Irvine's time for disclaimer under the 1986 Regulation expired *before* enactment of the Act. *See, e.g.*, n.9, *supra*. In the district court, the Government conceded that its application of the Regulation was retroactive. D. Ct. Br. 17-18.

before the date of the enactment of this Act [June 6, 1932]," and Congress's adherence to Section 501(b)'s prohibition in its multiple subsequent amendments to the Act "avoid[ing] any taint of retroactivity in connection with the [gift tax]. . . ." C. Lowndes, R. Kramer & J. McCord, *Federal Estate and Gift Taxes* 643 (1974).17/ Respondents' constitutional argument was based on a long line of this Court's precedents, which establish that in testing the constitutionality of a retroactive tax statute,

> [The court] must "consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." ... One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute.

United States v. Hemme, 476 U.S. 558, 568-69 (1986) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)).18/ Respondents argued below that application of the 1986 Regulation to tax Mrs. Irvine's Disclaimer, without notice, gave a different and more oppressive legal effect to her failure to disclaim before enactment of the Act. *See Hemme*, 476 U.S. at 569; *see also Heiner v. Donnan*, 285

17/ Congress has made every new gift tax disclaimer rule applicable only to interests created on or after enactment of the new rule. *See, e.g.*, Pub. L. No. 94-455, §§ 2009(b)(1), 2009(e)(2), 90 Stat. 1893, 1896 (1976).

18/ *See also Helvering v. Helmholz*, 296 U.S. 93 (1935); *Heiner v. Donnan*, 285 U.S. 312 (1932); *Untermyer*, 276 U.S. 440; *Blodgett*, 275 U.S. 142 (all holding federal transfer tax statutes unconstitutional under Due Process Clause).

U.S. 312 (1932) (statute held unconstitutional as a gift tax where narrow class of taxpayers subjected to much harsher treatment than remaining taxpayers for no legitimate purpose). Respondents also argued that imposition of the tax violated Lucius Ordway's constitutional rights.[19/]

Jewett did not present these statutory and constitutional issues because Jewett's interest was created in 1939, after the Act was enacted. Indeed, the fact that Jewett's interest was created after enactment of the Act was critical to the Court in resolving the narrow question before it. *See* 455 U.S. at 317. The Court emphasized this fact in response to Jewett's equitable argument based on Section 7805(b) of the Code, which affords the Government liberal discretion to apply regulations retroactively, but only to the *date of enactment* of the applicable Code provision. Jewett had argued that retroactive application of the Regulation to an interest created in 1939 was nevertheless an abuse of this discretion, because by the time the Regulation was adopted in 1958, it was already too late for him to disclaim. The Court rejected Jewett's equitable argument under Section 7805(b)'s deferential standard, but it did so because the Regulation interpreted a statute enacted *long before* his time for disclaimer began to run. It is, however, unprecedented and, indeed, forbidden under Section 7805(b) itself, for a regulation to have an effective date that *pre-dates* the effective date of the statute being interpreted, here imposing a time period for disclaimer that expired before enactment of the Act. *See also* Act § 501(b) (no retroactive application).

19/ Respondents quite rightfully asserted violations of Lucius's rights as well as Mrs. Irvine's. *See Hodel v. Irving*, 481 U.S. 704, 711-12 (1987) (rights of decedent to pass his property at death without violation of Fifth Amendment may be asserted by decedent's heirs and devisees without violation of prudential standing limitations).

The fact that Jewett's interest was created well after the Act also was critical to the Court's conclusion that Jewett had no "right" to make a disclaimer without gift tax consequences. 455 U.S. at 317. The Government's own brief before the Court in *Jewett* had advanced this position:

> [P]etitioner never had a right to disclaim his remainder interest free of gift tax. That tax is imposed by provisions of the Code enacted in 1932--seven years before [the trust was established creating his interest]. . . . Thus, the Regulation did not deprive petitioner of any pre–existing right.

8th C. Supp. App. 53-54. Unlike Jewett, Mrs. Irvine did have a pre-existing right, which was preserved by Section 501(b) of the Act and the Due Process Clause.

Thus, because the 1986 Regulation at issue here was not at issue in *Jewett*, and because this case presented statutory and constitutional issues not before the Court in *Jewett*, the judgment of the *en banc* court of appeals does not conflict with *Jewett*.

B. There is No Square Conflict Between *Irvine* and *Ordway* Due to the Dispositive, Constitutionally Significant Factual Differences Between the Two Cases.

Although the *en banc* Eighth Circuit opinion in the present case and the split panel opinion of the Eleventh Circuit in *Ordway* appear to be in conflict over the meaning of the 1986 Regulation, this Court reviews judgments and not opinions. There is an overarching factual difference between the two cases, so significant that *Irvine* and *Ordway* raise completely different retroactivity

problems. Thus, the *Irvine* and *Ordway* judgments do not present a square conflict for this Court to resolve.

Mrs. Irvine's time for making an effective disclaimer under the Regulation sought to be applied by the Government expired *before* enactment of the Gift Tax Act. Ordway, much younger than his sister, did not learn of his interest until 1941 and did not reach the age of majority until 1943. Under the Regulation, Ordway's time for disclaimer did not begin to run until *well after* enactment of the gift tax.

Because of this factual difference, Respondents' statutory and constitutional arguments in the courts below were different, and much more compelling, than Ordway's arguments. Because Ordway himself was not taxed on the basis of his failure to act before enactment of the Act, he could only argue that application of the Regulation to *any* pre-Act interests violated the consistent effective date history for new gift tax rules and violated *Lucius's* constitutional rights. Respondents' case is fundamentally different, because application of the Regulation to Mrs. Irvine retroactively and without notice deprived *her* of all opportunity to make an effective disclaimer.[20/]

Respondents recognize that the *en banc* Eighth Circuit in the present case and the split panel of the Eleventh Circuit in *Ordway* differed in their interpretation of the "taxable transfers" language of the 1986 Regulation. To the extent that the differing

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20/ The statutory and constitutional issues, while briefed and argued in the lower courts, were not directly passed upon by either the *en banc* Eighth Circuit or the Eleventh Circuit. They would, however, be squarely presented here if this Court were to reject the Eighth Circuit's interpretation of the 1986 Regulation. Because this Court would necessarily then need to reach these significant statutory and constitutional issues without any guidance from the circuit courts, this case is a poor vehicle for this Court to use to resolve a two-circuit disagreement over the meaning of a little-used Regulation.

interpretations present a problem for the Government, it is only a superficial one which the Government easily can resolve, at least as applied to future cases, by amending the 1986 Regulation. *See Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985) (opinion of Stevens, J., respecting denial of certiorari) (noting that "review in this Court is not necessary" in part because "the Coast Guard retains the power to modify its regulations" interpreted by the lower court). In fact, the Government, recognizing its own power to resolve differing interpretations of its regulations without this Court's intervention, informed the district court in this case in mid-1989 that it *did* intend to change the "taxable transfers" language:

> It's poor draftsmanship, there is no doubt about that, and the [Internal Revenue] Service has informed me they will be issuing in the next 90 days or so clarification on this point.21/

For some reason, despite its representation to the court, the Government never made the change and ultimately terminated the amendment project.22/

21/ 8th Cir. App. 40 (transcript of oral argument on cross motions for summary judgment on July 14, 1989; Thomas D. Sykes appearing for the Government).

22/ *See* IRS Notice 92-12, 1992-1 C.B. 500, 501 (IRS intends to terminate project as of June 30, 1992, without issuing regulations). The Government's contention that the court of appeals decision "threatens significant uncertainty" about the 1986 Regulation's application to interests created in certain *post*-Act transfers, Pet. 20 n.8, is without merit. The holding and analysis of the *en banc* court of appeals were strictly limited to interests created in nontaxable, *pre*-Act transfers. And in any case, particularly as to issues not involving *pre*-Act transfers, the Government can correct any perceived defects in its 1986 Regulation simply by amending it.

C. This Case Does Not Present a Recurring Issue of Substantial Importance.

1. This is the Only Case Involving a Disclaimant Whose Right to Disclaim Would Have Expired Before Enactment of the Act.

The Government distorts the facts in arguing the importance of this case, hypothesizing that *Irvine* might spawn litigation by "thousands" of taxpayers involving "billions of dollars" of trust assets and "enormous amounts" of gift tax revenues. Pet. 11, 21. These wild speculations are no substitute for the facts: Mrs. Irvine's case is the only case known to Respondents, and the Government has cited no others, involving a disclaimer of a pre-Act interest by a disclaimant whose right to disclaim would have expired before enactment of the Act under the Government's application of the 1986 Regulation. Only in cases like Mrs. Irvine's does application of the 1986 Regulation deprive the beneficiary of all opportunity to make an effective disclaimer. Mrs. Irvine's case is thus unique. This Court customarily does not exercise its power of discretionary review in cases bound by unique facts. *See Chevron U.S.A.*, 471 U.S. at 1140 (opinion of Stevens, J.), (among reasons supporting denial of certiorari, "apparently only one 26-year-old vessel" may be affected by lower court's ruling).[23/]

[23/] The Government also exaggerates the true amount at issue in referring to tax and interest exceeding $30,500,000. *See* Pet. 20. This case involves just over $7,500,000 in disputed tax. The amount of accrued interest is of no special significance, because it simply represents the time value of money available to any prevailing party in a tax controversy, whether the taxpayer or the Government. I.R.C. §§ 6601, 6611; 28 U.S.C. § 2411. Also, interest recovered by taxpayers is itself subject to federal income tax. I.R.C. § 61(a)(4).

The only other cases, past or pending, involving issues of the effectiveness of a disclaimer of a pre-Act interest are the two cases arising in the Eleventh Circuit involving disclaimers by Mrs. Irvine's relatives and the *Perkins* case recently filed in a First Circuit district court. These cases do *not* involve disclaimants whose rights to disclaim would have expired before the Act and, thus, the cases are fundamentally different from this case.[24/]

2. The Government's Bald Assertions About Large Numbers of Potential Cases Are Belied By the Total Absence of Any Other Cases Since 1958.

The Government posits that the *Irvine* decision "affects" the transfer tax liability of "a large number of individuals" who are beneficiaries of "thousands of trusts" created before 1932 with "billions of dollars" of trust assets. Pet. 20, 21. These assertions are entirely unsubstantiated, in stark contrast with the Government's usual practice of presenting detailed information about pending cases to justify review by this Court. *E.g.*, Mem. for Respondent at 9, filed in *Dickman v. Commissioner*, No. 82-1041 (supporting certiorari in part because "there may be as many as 31 pending cases" presenting same gift tax issue); Mem. for Respondent at 6, filed in *Diedrich v. Commissioner*, No. 80-2204 (supporting certiorari in part because "at least 22 other cases" presented same income

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24/ In the court of appeals, the Government had cited *Fuller v. Commissioner*, 37 T.C. 147 (1961), involving a disclaimer in 1956 of an interest created in 1931, but the issue whether the Regulation could apply to a pre-Act interest was not even raised in that case. The Tax Court found the disclaimer to be taxable because the taxpayer for almost twenty-five years had received the benefits of the interest purportedly disclaimed. This receipt amounted to acceptance, which always precludes an effective disclaimer. 37 T.C. at 155.

tax issue). The Government's unsubstantiated assertions here do not justify the Court's exercise of jurisdiction.

Disclaimers have been the subject of tax litigation at least since the early 1930s. If large numbers of cases like Mrs. Irvine's are likely *after Irvine*, as the Government contends, it seems clear that such cases, at least *one* other case, would have arisen in the thirty-five years since promulgation of the 1958 Regulation. In fact, in 1958, the number of potential cases of this type was at its highest. The number can only have diminished steadily since then, and the possibility of similar cases arising *now* is slimmer than ever. Only those persons now old enough to have learned of their interest *and* reached the age of majority before enactment of the Act *and* who are remainder beneficiaries of pre-Act trusts not yet terminated *and* who are still alive when the trust terminates might even consider disclaiming their remainder interests. Whether a disclaimer would be made would depend on not only the federal transfer tax consequences, but also a host of other factors. As each year passes and pre-Act trusts terminate and beneficiaries whose rights under the Regulation would have expired before enactment of the Act age and die, this small class of persons who might make a disclaimer will shrink further, until it is nonexistent.

D. In Any Event, Issues Relating to the Gift Tax Treatment of Disclaimers of Pre-Act Interests Should Be Left to Percolate Further in the Lower Federal Courts.

Review by the Court at this time would be at best premature. First, the Court may never have to consider the issue presented here at all, because other potential cases by the small class of potential disclaimants discussed above may never be filed. Second, the Court may never have to consider *any* issues of the effectiveness of a

disclaimer of a pre–Act interest, even issues involving disclaimants whose right to disclaim would not have expired before the Act. The Eleventh Circuit already has decided *Ordway*, and this Court already has declined review there. In *Johnson*, the Eleventh Circuit may have an opportunity to reconsider its split panel decision in *Ordway* in light of the *en banc Irvine* decision, and may decide *Johnson* in favor of the taxpayer. Similarly, the recently-filed *Perkins* case may present an opportunity for another court of appeals, the First Circuit, to consider an issue of the effectiveness of a disclaimer of a pre-Act interest, and the First Circuit also may decide in favor of the taxpayer. Third, if *Johnson* or *Perkins* eventually comes before this Court, the Court then would have another opportunity to consider whether to exercise its discretionary jurisdiction and would have the benefit of an Eleventh Circuit decision rendered in light of *Irvine*, a decision of the First Circuit, or both. Fourth, both Johnson's and Perkins' cases would be free of the unique retroactivity problems of this case, because their right to disclaim would not have expired before the Act. Finally, by then, if others of the putative "thousands" of beneficiaries of the trusts holding "billions" of dollars of assets have chosen to make disclaimers, as the Government here only speculates, the Government may then have a stronger basis to contend that review by this Court is appropriate.

E. Alternative Grounds Support the Judgment Below.

Finally, the judgment of the *en banc* court of appeals is supported by at least three alternative grounds, briefed and argued in the court below, that that court did not need to reach.[25/]

First, regardless of whether the Regulation can be properly and constitutionally applied to Mrs. Irvine's Disclaimer, the Disclaimer was timely and effective within the meaning of the Regulation because the number of remainder beneficiaries of the Trust was not fixed until the Trust terminated. This Court found it significant in deciding *Jewett* that the only contingency preventing Jewett from taking his share of trust principal was the requirement that he survive the life beneficiaries. *See* 455 U.S. at 318. Subsequent cases have recognized that *Jewett* is limited to these facts. For example, all three courts of appeals applying the Regulation to disclaimers by a surviving joint tenant of the deceased joint tenant's interest rejected the Government's contention that *Jewett* required disclaimer within a reasonable time of the transfer creating the joint tenancy. All three courts held that because an important contingency in addition to survival would prevent the surviving joint tenant from succeeding to the deceased joint tenant's interest, the relevant "transfer" for purposes of the Regulation did not occur until the death of the joint tenant, and disclaimer within a reasonable time after that death was timely.[26/]

25/ These alternative grounds also distinguish this case from the Eleventh Circuit's decision in *Ordway*, because none of them was briefed or argued by Ordway before that decision.

26/ *McDonald v. Commissioner*, 853 F.2d 1494 (8th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989) (lower court opinion at 89 T.C. 293, 295 n.7 indicates interest held more than thirty-four years before disclaimer); *Estate of Dancy v. Commissioner*, 872 F.2d 84 (4th

Important contingencies, in addition to the survival contingency, were also present for Mrs. Irvine. The number of remainder beneficiaries of the Trust, and the size of Mrs. Irvine's remainder interest, was subject to change throughout the Trust term and, in fact, did change considerably. Under these circumstances, the relevant "transfer" for purposes of the Regulation is not the transfer creating the interest but the termination of the trust, the event that caused the contingencies to disappear.

Second, if the Regulation applies and if Mrs. Irvine's Disclaimer falls within the scope of the *Jewett* holding, it is improper and inequitable, under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971),[27/] to apply the 1982 *Jewett* holding retroactively to tax Mrs. Irvine's 1979 Disclaimer. As discussed above, Mrs. Irvine resided in the Eighth Circuit her entire life, and at the time of her

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Cir. 1989); *Kennedy v. Commissioner*, 804 F.2d 1332 (7th Cir. 1986) (interest held more than twenty-five years before disclaimer). In all three cases, applicable local law permitted the deceased joint tenant, while alive, to sever the joint tenancy through sale of his or her interest, stripping the surviving joint tenant of any survivorship interest. The Government gave up litigating joint tenancy disclaimer cases in 1990. 8th C. Supp. App. 39-40 (IRS Action on Decision CC-1990-06 (Feb. 7, 1990)).

27/ *Chevron* remains persuasive authority even after *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), a case in which the Court considered the permissible scope of "selective nonretroactivity" of a decision involving an unconstitutional state tax. Unlike *Beam*, *Chevron* did not involve a new constitutional rule, and furnishes the appropriate test for analyzing the nonretroactivity issue in this case. As applied here, *Jewett* announced a new rule of law in the government's *favor*, not mandated by the Constitution, which overruled the *Keinath* holding on which Mrs. Irvine had justifiably relied in making her Disclaimer. Jewett resided in the Ninth Circuit and in any case could not have relied on *Keinath*, because he disclaimed before *Keinath* was decided, so *Jewett* cannot be said to have implicitly decided the nonretroactivity question presented here.

Disclaimer *Keinath* was the governing law, acknowledged as such by the Government. Under *Chevron*'s three-part test, application of *Jewett* to Mrs. Irvine's Disclaimer would be unfairly harsh, because *Jewett* overruled the *Keinath* decision on which Mrs. Irvine justifiably relied to her substantial detriment.

Finally, if the Regulation applies and if Mrs. Irvine's Disclaimer falls within the scope of the *Jewett* holding applied retroactively, Respondents respectfully submit that *Jewett* should be reconsidered, due to failures by both parties in that case to apprise the Court fully of the information and authorities relevant to the Court's holding. The Court's interpretation of "transfer" as used in the 1958 Regulation was premised on its view that the Commissioner had consistently interpreted the Regulation, *see* 455 U.S. at 318, when in fact he had not. *See* 8th C. Supp. App. 62-64 (letter ruling P.L.R. 6612201590A (Dec. 20, 1966)).[28/] The Court's interpretation also was based on an incomplete record of, among other things, the Government's position regarding disclaimers *before* issuance of the 1958 Regulation. Respondents obtained a number of documents in this case, in discovery and in the IRS FOIA Reading Room, that were not before the Court in *Jewett*. Two IRS policy statements in particular demonstrate that before the 1958 Regulation, the Government's position was that disclaimers would be effective for federal gift tax purposes as long as they

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28/ This ruling allowed a taxpayer with knowledge since 1936 of an income interest in a trust created in 1933 to disclaim free of gift tax in 1966 when she became entitled to additional income as a result of the death of one of the other income beneficiaries. The relevant "transfer" as the Service applied the Regulation in that ruling was the event entitling the taxpayer to more income than earlier, *not* the transfer creating her interest in 1933. The Commissioner's counsel thus misinformed the Court in oral argument in *Jewett* in stating that the Commissioner had "[a]bsolutely not" changed his mind on the meaning of the Regulation. 8th C. Supp. App. 6, 58–61.

satisfied state law. 8th C. Supp. App. 4-5, 31-38 (G.C.M. 27626 (Jan. 13, 1953); unnumbered G.C.M. (May 3, 1956)).[29] The parties also failed fully to inform the Court of the extensive authorities demonstrating that any separate federal timeliness standard in the 1958 Regulation was a new standard and, as such, should be applied only to interests created after its promulgation. *E.g.*, 8th C. Supp. App. 7, 65-68 (early draft of 1958 Regulation which district court ordered Government to produce in discovery containing detailed examples of "transfers" intended to be subject to gift tax but not mentioning disclaimers).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[29] G.C.M. 27626 states that "[t]he estate and gift tax provisions of the Code do not contemplate the taxing of testamentary gifts by renunciation," citing *Brown v. Routzahn*. The unnumbered G.C.M. discusses a proposed change of the Government's position on the gift tax treatment of disclaimers and indicates that the treatment at that time depended on local law.

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